

JULIE M. LAKE, RMR, RDR, CRR
Martin-Lake & Associates, Inc.
P.O. Box 7765
Missoula, Montana 59807-7765
406/543-6447 office
jml@martin-lake.com
United States Contract Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

ENERGY KEEPERS, INC.,

Plaintiff,

vs.

HYPERBLOCK, LLC, et al.,

Defendants.

No. 9:20-cv-00076-DWM

MOTION HEARING

STEVE NELSON, MICHAEL
BOEHME and BONNER PROPERTY
DEVELOPMENT, LLC,

Plaintiffs,

vs.

PROJECT SPOKANE, LLC, and
SEAN WALSH,

Defendants.

No. 9:20-cv-00082-DWM

MOTION HEARING

BEFORE THE HONORABLE DONALD W. MOLLOY
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

Russell Smith Federal Courthouse
201 East Broadway
Missoula, Montana 59802
Thursday, June 25, 2020 - 9 a.m. to 10:43 a.m.

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription.

APPEARANCES

For the Plaintiff ENERGY KEEPERS , INC.:

Daniel F. Decker
Energy Keepers, Incorporated 110
Main Street #304
Polson, Montana 59860
dan.decker@energykeepersinc.com

Sophia E. Amberson
VAN NESS FELDMAN, LLP
719 Second Avenue, Suite 1150
Seattle, Washington 98104
samberson@vnf.com

Anne E. Lynch
VAN NESS FELDMAN, LLP
1050 Thomas Jefferson Street
NW Seventh Floor
Washington, DC 20015
alynch@vnf.com

For the Plaintiffs: STEVE NELSON, MICHAEL BOEHME, and
BONNER PROPERTY DEVELOPMENT, LLC:

Robert Erickson
State Bar No. 9966
RHOADES, SIEFERT & ERICKSON, PLLC
430 Ryman Street
Missoula, Montana 59802
erickson@montanalawyer.com

For the Defendants HYPERBLOCK, LLC, PROJECT SPOKANE, LLC
and SEAN WALSH:

James A. Patten
PATTEN PETERMAN BEKKEDAHN & GREEN, PLLC
2817 Second Avenue North, Suite 300
Billings, Montana 59101
apatten@ppbglaw.com

Peter Ito (via videoconference)
ITO LAW GROUP
1550 Larimer Street, Suite 667
Denver, Colorado 80202
peter@itolawgroup.com
Sean Walsh (via videoconference)

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1 THURSDAY, JUNE 25, 2020

2 Whereupon, the following proceedings were had and
3 entered on the record in open court:

4 THE COURT: Good morning. Please be seated.

09:09:29

5 Before we get going, I was able to see that the table
6 was a little crowded, so I think I can keep straight where
7 everybody is sitting and there's no reflection on anybody
8 because you are seated at different places. It would be
9 helpful to me if you use the lectern when you are arguing.

09:09:57

10 I will not mandate that. If you are more comfortable
11 seated, just make sure that you are speaking into the
12 microphones. All right?

13 And you guys in the back there, let's make sure we keep
14 some social separation so that we're not exposing anybody.

09:10:19

15 Would you call the first matter on the calendar, please.

16 THE CLERK: This is the time set for a motion
17 hearing in Case No. CV-20-76-M-DWM, Energy Keepers,
18 Incorporated versus HyperBlock, LLC, et al., and
19 CV-20-82-M-DWM, Nelson, et al., versus Project Spokane, LLC,
09:10:43 20 et al.

21 THE COURT: All right, the first matter is the
22 Energy Keepers. Who is going to argue? Is it Ms. Amberson
23 or Ms. Lynch?

24 MS. LYNCH: Anne Lynch for EKI, Your Honor.

09:11:04

25 THE COURT: Okay, you are up.

1 MS. LYNCH: Thank you, Your Honor.

2 Anne Lynch for Energy Keepers, Inc. With me today is
3 also Dan Decker from Energy Keepers, Inc., and Brian
4 Lipscomb is here with us as CEO for Energy Keepers, Inc.

09:11:40

5 We are here today because Sean Walsh and his companies
6 are trying to avoid paying undisputed amounts owed to EKI
7 for electricity that they used to mine cryptocurrency at
8 their Bonner facility. There is no dispute about the breach
9 of contract or that Sean Walsh was the key or sole decision
10 maker at each step.

09:12:03

11 As set out in our papers, the alter ego test is met
12 here. HyperBlock and Project Spokane, Walsh and Walsh is
13 these companies. Just to quickly recap, Walsh formed the
14 two LLC defendants. He was the CEO and manager of
15 HyperBlock until the end of April. He was and remains the
16 sole member and manager of Project Spokane. Signed the
17 contracting documents with EKI. Caused his company to enter
18 into commercially unreasonable promissory notes with himself
19 and his company that ensured HyperBlock, LLC would remain
20 chronically undercapitalized, and caused the triggering
21 event to accelerate the maturity date of his notes in an
22 effort to personally acquire the equipment from the Bonner
23 Mill facility instead of paying his business obligations.

09:12:50

24 THE COURT: So let me ask you, I don't want to
25 interrupt your argument, but the thing that troubles me is

09:13:09

1 the--you are making a claim for breach of contract, but
2 doesn't Justice Scalia's opinion in *Grupo Mexico* say I have
3 no power--when there is strictly a breach of contract claim,
4 I have no power to enjoin the defendant in the case. Isn't
09:13:33 5 that what that *Grupo Mexico* case holds?

6 MS. LYNCH: Well, Your Honor, we would rely on the
7 Ninth Circuit's post *Grupo Mexicana* decision in
8 *Johnson* which stated that the four-factor test is still
9 applied in cases for monetary damages. And a preliminary
09:13:59 10 injunction is appropriate under Montana Supreme Court
11 precedent where the legal remedy, the monetary damages from
12 the defendants, would be inadequate due to allegations the
13 defendant will be insolvent at the time of judgment or
14 there's danger of dissipation of assets that would render a
09:14:19 15 judgment ineffective. And importantly what we're asking for
16 here is freezing the assets of the two LLCs and supervising
17 any sale that might go forward as was noticed in the prior
18 notification of public sale.

19 So we're not trying to do anything that would devalue
09:14:44 20 the assets of HyperBlock. In fact, it's in our interest to
21 maximize any value that remains in HyperBlock, LLC.

22 THE COURT: Doesn't this whole cryptocurrency
23 thing--those computers don't have a very long life, do they?
24 And if--if you are right and you've asked for a jury trial
09:15:06 25 and so has the other plaintiff, Nelson, and you are not

1 going to get a jury trial for some time and it sounds like,
2 at least from some of the materials that were filed, those
3 assets, the computers, their value is going to begin
4 diminishing on almost a daily basis. So how do you--how do
09:15:32 5 you deal with that issue?

6 MS. LYNCH: That is one of the reasons why we
7 haven't asked to enjoin the sale of those assets. What
8 we're looking for is the Court to supervise the proceeds of
9 such a sale. So the request for relief in our case is a
09:15:53 10 little bit different than in the other case. We're not
11 looking to stop the sale or do anything that would devalue
12 those assets.

13 THE COURT: Well, don't you have to have the sale
14 and then seek the injunction? You are asking--what are you
09:16:13 15 asking me to do?

16 MS. LYNCH: Well, what we are asking is that if the
17 sale does proceed, that the proceeds from the sale, for
18 example, be put in the court registry or some other
19 supervised escrow; that they be held until such a time until
09:16:34 20 a judgment is entered in the case so that actions taken
21 between now and then don't render such a judgment
22 ineffective.

23 THE COURT: And which assets is it that you are
24 concerned about if--I mean, do you have any dog in the fight
09:16:55 25 about what assets are sold if there is a sale?

1 MS. LYNCH: No, we do not for EKI. So in the event
2 there is a sale, we would ask that whatever proceeds are
3 generated from that sale be included.

4 THE COURT: Are you asking me to appoint a receiver?
5 If so, what are the bases I could do that?

6 MS. LYNCH: Really, you know, we're asking for--I
7 think the most appropriate thing would either be to put it
8 into an escrow or put it into the court so that the
9 monetary--the cash assets that are generated from the sale
10 are not dissipated between now and the entry of a judgment.
11 What we would ask for is either the court's registry or an
12 escrow account.

13 THE COURT: Is there some authority for that?

14 MS. LYNCH: Well, there is authority to freeze the
15 assets of a defendant pending the entry of a judgment. And
16 we see that in the--both the *Van Lone* case and the *Johnson*
17 case. *Van Lone* is a Montana Supreme Court case and, of
18 course, *Johnson* is the Ninth Circuit case that I mentioned a
19 few minutes ago. So there certainly is precedent for
20 freezing the assets.

21 Now we have the additional complication that you
22 highlighted here where the assets may lose value over time.
23 And in an effort to avoid losing the value of those assets
24 that exist today we're not seeking to freeze the sale but to
25 exercise the equitable powers of the court to insure that

1 those activities don't render an eventual judgment
2 ineffective.

3 This, you know, fits squarely within the Montana Supreme
4 Court precedent of avoiding irreparable harm based on
09:19:14 5 pattern and practice and the activity of the defendant in
6 this matter. There's been a string of affirmative actions
7 that have threatened the value of those assets to be used
8 for a judgment, including the Notice of the Public Sale
9 which was noticed the same day that EKI sent its notice of
09:19:46 10 the settlement amounts that were owed under the contract,
11 which remains undisputed.

12 There's no dispute in this case as well about the
13 undercapitalization of HyperBlock, the insolvency of
14 HyperBlock or close to insolvency of HyperBlock. There is
09:20:23 15 no dispute about the creation of the promissory note that
16 kept HyperBlock perpetually undercapitalized. I would just
17 note that there is a very similar case, *Peschel Family Trust*
18 case out of the Montana Supreme Court, where the Defendant
19 there had used a sliding scale for rent that his company
09:20:51 20 would pay to himself. And the court there found that that
21 type of use of a sliding scale of rent to personally profit
22 from the corporate entity enabled the defendant there to
23 make sure his corporation would never have sufficient assets
24 to satisfy the plaintiff's judgment. And the court--the
09:21:12 25 Montana Supreme Court found that that met the second prong

1 of the corporate veil piercing, using a corporate entity as
2 a subterfuge to defeat public convenience, justify wrong or
3 perpetuate fraud. So there are several cases from our
4 perspective that are directly on point with what has been
09:21:32 5 happening here with the three defendants that EKI has named.

6 We would just also add that in this situation the
7 equities tip in favor of an injunction. The business model
8 used for this cryptomining operation is basically to take
9 electricity which they contracted for to purchase from EKI
09:22:13 10 and convert that into currency. The defendants kept the
11 servers at the Bonner Mill facility running around the clock
12 performing that operation until the day that EKI shut off
13 power. So there is a strong injustice that would result by
14 allowing those activities to have occurred and then
09:22:42 15 dissipate the remaining assets that would prevent EKI from
16 recovering for those damages. I'll reserve the remainder of
17 my time for rebuttal.

18 THE COURT: So tell me one way or the other, whether
19 there is a preliminary injunction or the denial, how quickly
09:23:14 20 could the case be tried? As you know under Rule 65 when
21 there's injunctive relief requested, other than criminal
22 cases, it takes priority on the court's docket. So how
23 quickly? I mean, is it a whole bunch of discovery? It
24 doesn't seem like it, if you are saying it's undisputed
09:23:38 25 about this and undisputed about that. So how quickly?

1 MS. LYNCH: That's right, Your Honor. First of all,
2 we believe that a judgment against HyperBlock could
3 be--could occur in very short order. There is no dispute
4 about the contract claim, the damages, the amount that was
09:23:58 5 calculated, so that we believe can happen immediately.

6 Now, with respect to the two other defendants I think a
7 minimal amount of discovery would be required. You know,
8 something--you know, 90 to 120 days would be sufficient from
9 our perspective to complete the minimal discovery that would
09:24:19 10 be required.

11 THE COURT: So if I set a case in September, you
12 would drop everything else you are doing and nobody would
13 ask for a continuance of any dates and your clients would be
14 happy with a September trial date?

09:24:38 15 MS. LYNCH: I would like to confirm that with my
16 clients, but that would be our expectation that this would
17 move quickly. And we are certainly in favor of this moving
18 as quickly as possible and our expectation would be that
19 sometime in the fall this would be--

09:24:55 20 THE COURT: Just out of curiosity. Do you
21 anticipate or think that you are in a position to ask for
22 summary judgment on the question of liability?

23 MS. LYNCH: Yes, Your Honor. And there may be the
24 availability of a default judgment against HyperBlock as
09:25:11 25 well since they were--

1 THE COURT: They haven't appeared, have they?

2 MS. LYNCH: No, but they were served more than
3 30 days ago.

4 THE COURT: So why don't you take their default?

09:25:21 5 MS. LYNCH: We plan to do that, Your Honor.

6 THE COURT: Okay. Anything else you want to argue?

7 MS. LYNCH: Unless you have other questions for me,
8 I'll reserve.

9 THE COURT: All right, Mr. Patten, how do you want
09:25:36 10 to do it? Do you want to argue in response to both
11 simultaneously or do you want to respond to this claim now
12 and then respond later to the other case?

13 MR. PATTEN: I would just as soon respond to this
14 claim now, Your Honor.

09:25:50 15 THE COURT: All right, you are up.

16 MR. PATTEN: Good morning, Your Honor. Andy Patten
17 for the defendants Sean Walsh and Project Spokane.

18 Energy Keepers' motion, Your Honor, is long on
19 conclusion and really short on facts that support the
09:26:20 20 conclusions. And what I would like to do is just set the
21 table with I think the facts that are not in dispute. And I
22 don't think a claim that either Mr. Walsh or Project Spokane
23 are insolvent without anything underlying that is an
24 undisputed fact.

09:26:43 25 But Project Spokane entered into an energy purchase

1 contract with Energy Keepers, Inc. The Project
2 Spokane/Energy Keepers, Inc. contract was assigned to
3 HyperBlock, LLC as part of a sale of substantially all of
4 the assets of Project Spokane to HyperBlock, LLC. The terms
09:27:10 5 of the sale were a matter of public knowledge, and
6 essentially the sale included a \$5,000, Canadian dollar,
7 promissory note from HyperBlock to Project Spokane, secured
8 by the assets of HyperBlock.

9 Energy Keepers consented to the transfer, to the
09:27:42 10 assignment of its contract. The assignment letter, which is
11 one of the exhibits that have been stipulated into evidence,
12 allows Energy Keepers 90 days to conduct its due diligence
13 on the creditworthiness of HyperBlock and if it determines
14 that HyperBlock was not creditworthy, it could withdraw its
09:28:09 15 consent. The consent has not been withdrawn.

16 In 2019 Mr. Walsh lent \$2 million to HyperBlock, LLC so
17 that it could purchase new servers. In 2020 the Bank of
18 Montana lent HyperBlock, LLC approximately \$2.6 million so
19 it could buy additional servers. Those additional servers,
09:28:43 20 Your Honor, are the ones that are in dispute with
21 Mr. Nelson.

22 Bonneville Development Partners--excuse me. Bonner
23 Partner Development or Bonner Property Development obtained
24 a security interest in the HyperBlock assets as part of the
09:29:07 25 Montana--Bank of Montana loan. Walsh retained a security

1 interest in the HyperBlock assets as part of his loan.

2 Walsh's and Project Spokane's security interests were duly
3 noticed to the public through the filing of financing
4 statements with the Delaware Secretary of State.

09:29:32 5 From these fundamental facts that aren't in dispute
6 Energy Keepers takes a leap that Walsh undercapitalized
7 HyperBlock. It takes that leap after it had 90 days and it
8 knew of the transaction between Project Spokane and
9 HyperBlock. It had the time to investigate that, yet it now
09:30:01 10 claims that Project--or that HyperBlock was undercapitalized
11 by Mr. Walsh.

12 THE COURT: So let me ask you about Mr. Walsh. So
13 Energy Keepers, we've got them on the one side of this, but
14 then we have Mr. Walsh who is the sole member of Project
09:30:23 15 Spokane. Am I right?

16 MR. PATTEN: He is now, Your Honor.

17 THE COURT: And he's also the CEO and a member of
18 HyperBlock, LLC, right?

19 MR. PATTEN: He is a shareholder in HyperBlock,
09:30:41 20 Inc.--

21 THE COURT: He's going to rattle his brain there.
22 His head is going back and forth.

23 MR. PATTEN: I'm not looking at him.

24 But, Your Honor, Mr. Walsh is a shareholder of
09:30:52 25 HyperBlock, Inc., which is a Canadian publicly traded

1 corporation.

2 THE COURT: Yeah, that's in bankruptcy or was in
3 bankruptcy.

4 MR. PATTEN: It was put in bankruptcy a month ago in
09:31:04 5 Canada.

6 THE COURT: That's also a member of HyperBlock, LLC?

7 MR. PATTEN: That's the sole member of HyperBlock,
8 LLC.

9 THE COURT: And Walsh is the chairman and CEO and

09:31:15 10 owns 21 percent of the stock of HyperBlock, Inc.?

11 MR. PATTEN: He owned 21 percent, Your Honor, at the
12 time of the arrangement, which is what they call mergers in
13 Canada.

14 THE COURT: Okay. And then HyperBlock Technologies,
09:31:34 15 Inc. is a Canadian company no longer in existence?

16 MR. PATTEN: Correct. It was--it was merged into
17 HyperBlock, Inc.

18 THE COURT: Yeah. One of the things that--of
19 course, there's claims about alter ego penetration. But it
09:31:53 20 seems like this is the guy on the block in Time Square that
21 has the three nuts that you are--he puts a pea under one of
22 them and you are trying to figure out where the pea is.
23 That looks like what's going on here.

24 MR. PATTEN: I don't think so, Your Honor, because
09:32:10 25 everything is public. And, more importantly, Energy Keepers

1 knew of all of this, so there was nothing hidden from Energy
2 Keepers. Energy Keepers knew that Project Spokane was going
3 to have a \$5 million note secured by the assets of
4 HyperBlock, LLC. They knew about that and they knew about
09:32:33 5 it in time to withdraw their consent. They didn't do it.

6 THE COURT: Did Mr. Walsh have \$2 million of his own
7 money loaned in there some place?

8 MR. PATTEN: It was after the--chronologically, it
9 was the assignment of the contract was in July of 2018.
09:32:56 10 Mr. Walsh's loan, and it's Exhibit B, I think, in our
11 exhibits, but I think that's in the spring of 2019.

12 THE COURT: Did he get his money back?

13 MR. PATTEN: No. He's still owed \$2 million and
14 he's one of the parties that's doing the disposition sale.
09:33:19 15 So chronologically in terms of liens, Project Spokane has
16 the first perfected lien and Mr. Walsh has the second
17 perfected lien. But Mr. Walsh's loan was for a legitimate
18 business purpose. It was to buy servers, it was to buy
19 mining equipment. There's nothing nefarious about that.

09:33:43 20 THE COURT: Yeah, but the equipment was purchased in
21 January of 2020?

22 MR. PATTEN: No, Your Honor. Mr. Walsh's loan
23 bought equipment that was purchased in--

24 THE COURT: 2019.

09:33:56 25 MR. PATTEN: --2019. The Bank of Montana loan was

1 used in January of 2020 to buy the 1,493 new highest
2 generation servers.

3 THE COURT: And then in February one month later
4 Mr. Walsh knew things were going toe up, right?

09:34:20 5 MR. PATTEN: I don't know that he knew that.

6 THE COURT: He's shaking his head no, so.

7 MR. PATTEN: But I don't know that that makes
8 Mr. Walsh having any kind of improper conduct.

9 THE COURT: Well, if he's self dealing, and the case
09:34:45 10 cited by counsel, does that make a difference in terms of
11 how the case here proceeds?

12 MR. PATTEN: I don't think it is self dealing and I
13 don't think that it is improper. These are not unusual
14 commercial transactions that both Mr. Walsh and the Bank of
09:35:07 15 Montana entered into, or the loans. Certainly nothing that
16 Project Spokane has done has been improper.

17 Judge Cavan in a decision involving trying to pierce the
18 corporate veil said that there has to be some--I don't
19 remember the language off the top of my head. It's in our
09:35:45 20 brief, Your Honor. But it's some improper activity that was
21 conducted by the person who you are trying to pierce the
22 veil to get through and there is no evidence of that here.
23 We have loans that were--we have the Project Spokane loan
24 that was fully disclosed to Energy Keepers. Energy Keepers
09:36:12 25 had its eyes wide open and entered into a contract and said,

1 okay, instead of Project Spokane being a party to our energy
2 contract, we're going to let HyperBlock, LLC be the party to
3 that contract. They are trying to repudiate that now. And
4 they are trying to repudiate it based on the argument and
09:36:31 5 not the fact that Mr. Walsh and Project Spokane are
6 insolvent or that they have a history of dissipating or
7 hiding assets, although they offered no actual fact that
8 backs up a claim that either Walsh or Project Spokane hide
9 or dissipate assets.

09:36:55 10 THE COURT: Well, take me back to square one. Did
11 he use the energy that was supplied by Energy Keepers? Was
12 that used by Mr. Walsh and his companies?

13 MR. PATTEN: It was--it was used by Project Spokane
14 until it was assigned and then it was used by HyperBlock,
09:37:19 15 LLC.

16 THE COURT: Well, is there 3 point some million
17 dollars owed to Energy Keepers?

18 MR. PATTEN: I don't think there is a dispute as to
19 the amount.

09:37:29 20 THE COURT: Okay. And is there any dispute that,
21 whoever the entity was, they were using the energy to run
22 the mining operation at Bonner?

23 MR. PATTEN: I don't think there is a dispute about
24 that.

09:37:42 25 THE COURT: So what's the defense?

1 MR. PATTEN: The defense is that Mr. Walsh is a
2 separate individual and is not liable for the debt of
3 HyperBlock, LLC. Energy Keepers is trying to pierce the
4 veil based on a claim that HyperBlock, LLC was
09:38:14 5 undercapitalized. Now, they had 90 days after they
6 consented to the assignment to determine if HyperBlock, LLC
7 was undercapitalized. They didn't withdraw their consent.
8 So at least through 90 days after that assignment was
9 approved they were satisfied with the creditworthiness of
09:38:33 10 HyperBlock, LLC. After that Mr. Walsh made a loan with his
11 money to HyperBlock, LLC to buy Bitcoin mining servers and
12 he took a lien for that loan. That happens all the time,
13 every day. It's happening right now somewhere in Missoula,
14 I'm sure. Then in January the Bank of Montana lent
09:39:09 15 HyperBlock money to buy servers and they were purchased.

16 So what Energy Keepers is, I guess, concluding is that
17 borrowing money to buy an asset for an operating business is
18 somehow improper, and it isn't. It's entirely appropriate
19 that HyperBlock, LLC buys equipment with which to conduct
09:39:38 20 its operations. Particularly, Your Honor, as you noted
21 earlier, these computers are sort of kind of perishable.
22 They are worth less tomorrow than they are today. And so
23 one of the reasons to have the newest, fastest, slickest
24 Bitcoin server is because it can operate faster. And as it
09:40:13 25 operates faster, it performs the functions that enable it to

1 get their Bitcoins faster and more frequently.

2 And so it's entirely appropriate for HyperBlock, LLC to
3 want to have the fastest, best servers for Bitcoin mining
4 purposes because it makes more money for them. And there is
09:40:36 5 nothing improper about that. There is nothing nefarious
6 about that. There is no self dealing by Mr. Walsh in that.
7 There is no self dealing by Project Spokane in that. And
8 there is certainly no evidence that's been presented that
9 Mr. Walsh or Project Spokane are dissipating their assets or
09:40:57 10 have a history of concealing the assets.

11 THE COURT: And if there's a sale, who gets the
12 money? Mr. Walsh?

13 MR. PATTEN: Project Spokane would get it first and
14 then if Project Spokane's debt was satisfied, then Mr. Walsh
09:41:12 15 would get it.

16 THE COURT: And then Energy Keepers is just out to
17 lunch?

18 MR. PATTEN: Yes.

19 THE COURT: So I guess that's the way business is
09:41:22 20 done in this country?

21 MR. PATTEN: Absolutely it is, Your Honor. If--

22 THE COURT: Okay. Well, I won't get into editorial
23 comments.

24 But what about Justice Scalia says because such a remedy
09:41:38 25 was historically unavailable from a court of equity, we hold

1 the district court had no authority to issue a preliminary
2 injunction preventing petitioners from disposing of their
3 assets pending adjudication of respondent's contract claim
4 for money damages? How does that play out here?

09:41:56 5 MR. PATTEN: Well, I think that's the law in the
6 United States, including the Ninth Circuit. But what--they
7 are not trying to enjoin Mr. Walsh or Project Spokane from
8 disposing of their assets. They are trying to enjoin
9 HyperBlock from disposing their assets through an Article 9
09:42:19 10 disposition sale.

11 THE COURT: Uh-huh.

12 MR. PATTEN: So--

13 THE COURT: Well, counsel says we don't want to stop
14 the sale. We want an injunction to keep whatever the
09:42:36 15 proceeds of the sale in the court registry or
16 something--some other place. I'm curious if there is any
17 authority to do that before there's a sale. And if there's
18 a sale, what's the procedure?

19 MR. PATTEN: I don't know the answers to those
09:42:56 20 questions, Your Honor. But what they haven't--what Energy
21 Keepers hasn't shown is why they can get an injunction
22 when--they haven't shown that a monetary judgment does not
23 provide--is going to be inadequate. If--and a preliminary
24 injunction shouldn't be provided, shouldn't be ordered
09:43:30 25 unless monetary damages are going to be inadequate and there

1 is nothing to indicate that--there is no evidence that's
2 been put before the Court to come to that conclusion.

09:43:50

3 THE COURT: Well, HyperBlock, LLC has enough money
4 to cover the three and a half million dollars that they owe
5 the Energy Keepers, plus the money they may owe, if they do
6 owe to Mr. Nelson his partner?

7 MR. PATTEN: No, I don't believe that HyperBlock,
8 Inc.--or HyperBlock, LLC does.

09:44:09

9 THE COURT: So isn't that the whole argument, that
10 there isn't enough there to cover any judgment, so freeze
11 what they do have until after we get a resolution, a final
12 resolution of the case.

09:44:32

13 MR. PATTEN: But what they--in order to do that they
14 have to have some kind of claim against Mr. Walsh and
15 Project Spokane that would entitle them to repudiate the
16 contract that they made and consented to with HyperBlock,
17 LLC. When they--Your Honor, when the contract was assigned
18 and Energy Keepers consented to it without asking anybody to
19 guarantee it, then Energy Keepers made the decision to rely
20 on HyperBlock, LLC only for payment of the energy. Now they
21 are trying to change the terms of that contract and come
22 back and say, well, we think Walsh is going to secrete
23 assets and we need to prevent him from getting the assets to
24 secrete. And they don't have any evidence that he has any
25 kind of a history or a proclivity to secrete assets or to

09:45:34

1 dissipate the assets. So what they are trying to do, Your
2 Honor, is to use an injunction to preserve the status quo in
3 terms of the assets of HyperBlock when HyperBlock is the
4 only creditor, is the only party to Energy Keepers' claim
09:46:05 5 until they can rope in Mr. Walsh and Project Spokane.

6 THE COURT: Okay, before you sit down, because you
7 are out of time, there is a jury demand here. How quickly,
8 if there's a trial, do you believe you could be prepared to
9 try the case? Just listening, it sounds like the issue is
09:46:30 10 going to be the piercing of the corporate veil, if that's a
11 viable claim.

12 MR. PATTEN: Well, as Ms. Lynch noted, we would need
13 some time for discovery. She said four months and I don't
14 dispute that. So it seems to me that if we need four months
09:46:48 15 for discovery and we have a time period for summary judgment
16 motions and whatnot, then we're looking at six months. And,
17 Your Honor, even then that seems highly expeditious to me in
18 my experience.

19 THE COURT: It is, but I like to work fast. All
09:47:10 20 right, thank you.

21 Ms. Lynch, you've got about six minutes and 53 seconds.

22 MS. LYNCH: Approximately. I think I can make this
23 fairly short. I appreciate the time for rebuttal.

24 With respect to the assignment of the contract and the
09:47:37 25 argument that EKI had eyes wide open at the time of agreeing

1 to that, at the time of that assignment which was in July
2 of 2018 there was no reason to think that HyperBlock, LLC
3 was not creditworthy. The action, as we've laid out in our
4 verified complaint and elsewhere, that really drove
09:48:15 5 HyperBlock, LLC into the ground and all the self dealing,
6 happened largely after that consent to assignment. EKI
7 certainly believed that HyperBlock was going to pay its
8 bills. HyperBlock was presented as basically a continuation
9 of Project Spokane, LLC, operating the same business at the
09:48:43 10 same address, same customers, and Project Spokane had been a
11 good customer during that time.

12 As we've laid out, it was really the actions taken by
13 Walsh to manipulate these transactions that occurred more
14 recently that solidify our alter ego in piercing the
09:49:11 15 corporate veil argument. His actions as CEO of HyperBlock,
16 Inc. to trigger the acceleration of the promissory note and
17 then noticing the public sale and the other actions that
18 we've already talked about, it's his actions that are
19 causing the HyperBlock insolvency here and that's the basis
09:49:39 20 for our veil piercing argument.

21 And the question of the consent to assignment, you know,
22 from our perspective is a little bit by the point anyway.
23 There is no dispute about the facts of what happened in the
24 time since then.

09:50:03 25 And then just one more point about the monetary request.

1 We are not arguing that a monetary judgment would be
2 inadequate, if HyperBlock had the money or whoever has the
3 money that would be adequate. We're just arguing it's
4 likely to be ineffective given the inability of HyperBlock
09:50:35 5 to pay the amounts that it owes and the question about
6 whether that monetary relief is available elsewhere. So
7 that's what we're requesting. We've tried to tailor our
8 request as narrowly as possible to the needs as presented by
9 this particular situation.

09:51:12 10 Then I have one housekeeping matter that I want to be
11 sure I don't sit down without taking care of, and that's
12 with respect to the exhibits that we have included in our
13 filings. We have reached stipulation with the defendants,
14 Walsh and Spokane, to the admissibility of those, save for
09:51:34 15 the bankruptcy filing exhibits that were attached to the
16 second declaration where my understanding is there's simply
17 an objection based on relevancy.

18 THE COURT: That's the Canadian bankruptcy?

19 MS. LYNCH: It's the AQH, LLC bankruptcy, which was
09:51:56 20 Walsh's former cryptocurrency mining operation in
21 California, where there was a similar situation where the
22 company did not pay for the, you know, last month of its
23 electricity usage that it owed to its landlord and then the
24 company went into bankruptcy but did not receive a
09:52:18 25 discharge. So we included those exhibits to show the

1 pattern and risk here, and my understanding is that there's
2 a relevancy objection but no other objection to those
3 exhibits.

09:52:38

4 THE COURT: All right. If the cases go forward, any
5 problem with consolidating them for trial?

6 MS. LYNCH: I don't think that there's a problem
7 with consolidating them for purposes of a trial.

8 THE COURT: All right, thank you.

09:53:01

9 Now we will go to the case of Stephen Nelson and Michael
10 Boehme and Bonner Property Development, LLC versus Project
11 Spokane, LLC and Sean Walsh, which is CV-20-M-DWM.

12 Is it Mr. Erickson?

13 MR. ERICKSON: It is, Judge.

14 THE COURT: You are up.

09:53:21

15 MR. ERICKSON: Good morning, Judge. Robert Erickson
16 on behalf of the plaintiffs; that's Steve Nelson, Mike
17 Boehme individually, and also on behalf of Bonner Property
18 Development, LLC. They are seated here with me at counsel
19 table.

09:53:35

20 First thanks, Judge, for the expedited schedule. Thanks
21 for making the time today. We really appreciate it. These
22 are critical issues.

23 I want to be first clear about the relief we are seeking
24 here today. We want the Court to put the brakes on this
09:53:49 25 sale but only with respect to certain components of it.

1 First, the fixtures of Bonner Property Development were
2 noticed for sale. Well, they shouldn't be sold because they
3 belong to Bonner Property Development.

09:54:09

4 THE COURT: What exactly are the fixtures and the
5 computers that you claim should not be a part of the sale?

09:54:32

6 MR. ERICKSON: Sure, Judge. Let me focus first on
7 the computers because that's a little easier to separate.
8 There is only one subgroup of computer servers in which we
9 claim an interest. It's the 1,493 Bitmain Antminer S17 Plus
10 servers. The rest of the servers we don't have a claim
11 against those and we don't object to a sale of those. They
12 don't belong to us.

09:54:47

13 On the other hand, the fixtures surely belong to us. So
14 everything that is affixed to the property is a fixture. By
15 definition, it belongs to the realty. That's not only under
16 real property law, but it's also what the lease agreements
17 provide.

09:55:02

18 Beyond that there are certain items that, whether or not
19 strictly considered a fixture, are intended to remain with
20 the property by contract. And so essentially everything on
21 that Notice of Sale that's not a server should remain with
22 the property. In addition, those servers that I mentioned
23 should also not be sold.

09:55:17

24 THE COURT: So if Spokane and Walsh go forward with
25 the sale and they sell the 1,493 Bitmain Antminer S17 Plus

1 servers, does that extinguish any security interest that
2 Bonner property has?

3 MR. ERICKSON: It would functionally, Judge. The
4 defendants acknowledge that we do have a security interest.
09:55:46 5 They just argue that it's not a priority security interest.
6 The figures at issue here, though, would far eclipse that.

7 And, Judge, there is another risk here. It's not clear
8 to me at all that this will be a cash sale. Under an
9 Article 9 disposition it certainly could be a credit bid.

09:56:03 10 We have every indication that's what it will be. A credit
11 bid with money that doesn't really exist. And in exchange
12 for that Mr. Walsh will receive all these servers and be
13 able to do with them what he pleases. That's also sort of
14 the risk associated with allowing a sale to go forward but
09:56:19 15 depositing the money in a trust account or with the court
16 registry, it doesn't have to be a cash sale here and in fact
17 there is a serious risk that there won't be.

18 Judge, I've talked about the fixtures. I don't think
19 there is much of a dispute there. The law is on our side
09:56:41 20 and I'm not sure that defendants intend to sell that
21 property anymore.

22 There is that other personal property that was promised
23 to remain on the premises. It's essentially that second
24 list on the Notice of Sale. The lease documents provide for
09:56:55 25 that. Even if it was paid for by the tenant, and some of it

1 was but not all of it, it was intended to remain with the
2 property whether or not strictly called a fixture.

3 So what we're really focusing on is the servers. We
4 have no claim on the remainder of the servers. That 1,493
09:57:14 5 S17 Plus we most certainly do. And it's not just a security
6 interest, it's a priority security interest.

7 THE COURT: Say that again. If you answered
8 correctly, that if those computers are sold it extinguishes
9 your security interest, how do you have a priority if it can
09:57:32 10 be extinguished by the sale?

11 MR. ERICKSON: And, Judge, I'm talking about if the
12 sale goes forward and we don't have a resolution of our
13 argument, our claim which we've supported by the facts, then
14 that's what will happen. In other words, there is an
09:57:47 15 assumption right now that our security interest is junior.
16 We contend that it's senior in a court of equity and I would
17 be glad to explain why.

18 THE COURT: Well, I understand. But they perfected
19 the security interest in Delaware which is where it had to
09:58:03 20 be perfected; is that right?

21 MR. ERICKSON: They did. We have no dispute about
22 that.

23 THE COURT: Why didn't--why didn't Mr. Nelson and
24 the Bonner Development, why didn't they perfect their
09:58:19 25 security interest by filing it with the Secretary of State?

1 I know they did later but they only did that in May, right,
2 of this year?

3 MR. ERICKSON: That's correct, Judge, those are
4 facts. But the reason why is because Sean Walsh promised
09:58:32 5 them a first position security interest. He had promised
6 them that before in prior transactions and had kept his
7 word. In this circumstance he made that representation.
8 They relied on it and it did not come to pass.

9 THE COURT: Just one second.

09:58:46 10 Mr. Walsh, stop shaking your head. It's distracting.
11 It's inappropriate. And if you cannot constrain yourself,
12 then you are going to be sitting in Puerto Rico wondering
13 what's going on, because I'll cut you off. You get it?

14 MR. WALSH: My apologies, Your Honor. I'll sit
09:59:11 15 still.

16 THE COURT: You may proceed now.

17 MR. ERICKSON: Thank you, Judge.

18 Mr. Walsh made these representations over and over and
19 in writing--

09:59:20 20 THE COURT: But as Mr. Patten is wont to argue,
21 there's the law, and it might not seem right. You take
22 somebody at their word if that's what was given. But the
23 law, Article 9, says you have to perfect your security
24 interest before you get a priority and you didn't do that,
09:59:37 25 did you?

1 MR. ERICKSON: Well, Judge, let me take those points
2 in tandem. Number one, we did not do that. We freely admit
3 it.

09:59:50

4 No. 2, the UCC also incorporates common-law principles,
5 including equitable principles, and that's exactly what
6 we're arguing today. Promissory estoppel, equitable
7 estoppel, unjust enrichment and, indeed, fraud.

10:00:08

8 That's the basis of our arguments and the facts clearly
9 support them. We have representations that were relied upon
10 justifiably. In the face of that reliance our clients
11 pledged millions of dollars of real estate. They put their
12 personal credit on the line via personal guaranties. And
13 what did they do that for? They did that for HyperBlock's
14 loan from Bank of Montana.

10:00:27

15 So let me be sure that we're clear on that. HyperBlock
16 borrowed the money to buy these servers but they didn't post
17 any security. Sean Walsh didn't post any security. Project
18 Spokane certainly didn't. Instead, it was our clients who
19 put their property and their good credit at risk. And so,

10:00:44

20 Judge, it makes perfect sense that they have a first
21 priority security interest. It's akin to a purchase money
22 security interest. We're not claiming that here. We can't.
23 The loan wasn't made directly, but it might as well have
24 been. They put up all the collateral for this loan and then
25 what was purchased with that loan, they were promised a

10:01:02

1 first lien position. Very typical. If it were a purchase
2 money security interest, there would be no debate about
3 that.

4 So, Judge, you are right, because of the UCC filings,
10:01:16 5 which we don't dispute, we're arguing an equity under these
6 facts, representation, justifiable reliance to our clients'
7 severe detriment the Court should preserve the status quo
8 with respect to these subset of servers, and clearly with
9 respect to the collateral and collateral-like items in order
10:01:36 10 for us to litigate this case and be able to have the
11 collateral to use to satisfy at least in part this Bank of
12 Montana loan. That was the program from the beginning, the
13 middle and the end and we're asking the Court just to
14 preserve that.

10:01:51 15 THE COURT: Was Mr. Walsh required to personally
16 guarantee the loan with the Bank of Montana?

17 MR. ERICKSON: No.

18 THE COURT: Why not?

19 MR. ERICKSON: The loan again, Judge, was to
10:02:01 20 HyperBlock. Bank of Montana didn't require that. But what
21 they did require--they wouldn't loan HyperBlock money unless
22 our clients pledged significant amounts of real property and
23 personally guaranteed it. HyperBlock didn't have the
24 wherewithal to--it didn't have the collateral or the
10:02:18 25 encumbrance-free collateral to be provided a loan.

1 THE COURT: But it's not entirely clear to me.
2 There is reference in the briefing, but the money, initially
3 the 2.6 or 2.5, whatever it was from the Bank of Montana,
4 was initially for improvements in the Bonner property, but
10:02:43 5 then Missoula County changed some regulatory or did
6 something that the money couldn't be used to install the
7 generators or whatever it was that the 40-megawatt
8 whatever--

9 MR. ERICKSON: Right, that's primarily correct,
10 Judge. Initially everybody thought we're going to get this
11 Bank of Montana loan in which our clients were promised a
12 first position security interest in whatever was purchased
13 with that. That was originally going to be improvements to
14 the property.

10:03:17 15 HyperBlock later made a business decision based on, I
16 assume, what Missoula County did and other reasons, probably
17 economic factors as well, to not do those improvements. But
18 they requested that that Bank of Montana loan stay open
19 without any disbursements because they might need it for
10:03:36 20 something later. The regulatory regime might have changed,
21 for instance. Well, it hasn't.

22 But then they asked to be able to use that Bank of
23 Montana loan funding under the same exact conditions, the
24 same agreements that remained in place with a promised first
10:03:51 25 security interest to use those for servers. Our clients had

1 another opportunity to object, but in light of the promises
2 that they received, first priority lien interest, they
3 consented to that.

4 And then another time when the loan funds were actually
10:04:04 5 disbursed our clients had to approve those. Again in
6 reliance of the promises they had they allowed those to
7 happen. So those purchases occurred in January and
8 February. And what happened next--the timing is important
9 here, Judge.

10:04:18 10 Within a month--and keep in mind that Mr. Walsh is CEO
11 of HyperBlock. He's CEO of HyperBlock, Inc., the parent
12 company. He solely owns Project Spokane and, of course,
13 he's in the middle of all of this. He had to know, Judge, I
14 would submit, that HyperBlock, Inc. was on the verge of
10:04:39 15 bankruptcy. HyperBlock, LLC was facing this imminent
16 Bitcoin halving event. They couldn't pay their energy
17 bills. I think we can develop the evidence through modest
18 discovery to absolutely establish that. So buy the servers.
19 One month later, can't pay the energy bills. One month
10:04:58 20 later, Mr. Walsh and his company called their notes due.
21 Days later, bankruptcy, the operation has shut down. That
22 timing is so close, Judge, it just can't be a coincidence.

23 THE COURT: Well, you may not know the answer to
24 this and it's not anything a part of the record, but
10:05:17 25 curiosity.

1 Once the purpose of the loan from the Bank of Montana
2 became obvious with whatever regulatory changes occurred, at
3 that point it wasn't going to be used to improve the real
4 property. So why didn't they then--if Mr. Walsh wanted to
10:05:41 5 use that money for computers or some other purpose, why
6 didn't they insist that he guarantee, just like they had,
7 the performance on the loan?

8 MR. ERICKSON: Well, Judge, the simple answer is
9 because they trusted him. He signed the documents in which
10:05:57 10 the representations are contained. He was CEO of
11 HyperBlock. He was the sole member of Project Spokane. And
12 they had engaged in similar transactions before which
13 actually worked out. This time they didn't.

14 And if we look at the timing again, it sure seems quite
10:06:13 15 calculated that this was destined to fail from the
16 beginning. It's unfortunate that our clients didn't realize
17 that and it's unfortunate they took Mr. Walsh's word, but
18 the fact is that they did.

19 So, Judge, we have representations clear and
10:06:32 20 unambiguous. And keep in mind that we don't have to
21 necessarily prove a representation. We're arguing equitable
22 estoppel, among other things. If there is silence or acts
23 that constitute a representation or a material concealment,
24 that's enough to achieve that element. And we certainly
10:06:48 25 have detrimental reliance. So we submit that we can

1 establish all of our equitable claims in this case.

2 So in light of all of these facts what do defendants
3 argue? Well, they make two arguments which are equally
4 insufficient to defeat injunctive relief.

10:07:05

5 First, Mr. Walsh makes the specious arguments that he
6 didn't read these contracts to which his signature was
7 affixed. He didn't know about the representations because
8 he didn't read the contracts of this multi-million dollar
9 deal while he was CEO of the very companies involved in it.

10:07:22

10 Now, Judge, you are the arbiter of truth here, but it
11 strains credibility that a sophisticated chief executive
12 officer involved in a multi-million deal with multi-national
13 companies didn't bother to read the contracts.

10:07:39

14 Judge, we've referenced in our materials and we've
15 provided to the Court today volumes of e-mails in which Sean
16 Walsh either received or sent and certainly participated in
17 where these contracts are circulated.

10:07:58

18 In each of the agreements, and I don't want to say that
19 the particular portions of the agreements changed, I don't
20 want to say that negotiations should reflect what actually
21 the agreements came to be because they don't. The critical
22 portions of these agreements, the representations, they are
23 in all of them. They were there from the beginning. They
24 were a key part of this deal from our clients' perspective
10:08:14 25 and a key inducement for them to agree to put their credit

1 at risk. There is volumes of these e-mails, Judge. For
2 Mr. Walsh to say that he'd never read these contracts is
3 just not credible.

10:08:30

4 Mr. Walsh also argues that he didn't make the
5 recommendations on behalf of himself or Project Spokane.
6 Well, we're not arguing a contract case here, Judge. We're
7 arguing equitable remedies. Mr. Walsh made the
8 representations, he signed the documents, period.

10:08:47

9 As to Project Spokane, inseparable. Energy Keepers has
10 made that argument quite cogently. I won't try to repeat
11 it.

10:09:04

12 If not, an agency relationship can also lead to
13 equitable remedies and even a fraud remedy. Clearly Walsh
14 is Project Spokane's agent. If not an actual agent, sole
15 member and then certainly an ostensible agent, he at least
16 negligently allowed our clients to believe that and they
17 did.

10:09:16

18 And then finally Project Spokane, for itself, it
19 ratified these agreements. Later in time Project Spokane
20 wanted additional collateral. It took Bonner Property
21 Development's lease as additional collateral. That lease,
22 as amended, references the Credit Enhancement Agreement
23 which provides for the first position lien. That references
24 the security agreement that shows that everything purchased
25 with Bank of Montana assets would be subject to that first

10:09:32

1 priority lien. For him to claim that he didn't know about
2 it, Judge, strains credibility. And also Project Spokane
3 adopted that. They ratified it when they entered into that
4 arrangement.

10:09:47

5 I want to spend just a minute talking about irreparable
6 harm. With respect to the fixtures there is no doubt there
7 would be irreparable harm. Removing these 400-plus fans,
8 gigantic fans, from the roof of this gigantic building would
9 leave that building unrentable for months. That's

10:10:07

10 irreparable harm. And I'm not sure that there is much
11 dispute about that now.

12 The other personal property, the same thing. If it's
13 electrical property, if it's affixed to the property, that
14 causes irreparable harm because the building is functionally
15 destroyed if it's removed.

10:10:21

16 Now, the real action here, I think--I won't speak for
17 Mr. Patten, but I think the fixtures issue has been set
18 aside, the other personal property.

19 The real action here is these servers, right? And,
20 again, we concede that we abandoned our claim to the 10,000
21 other older servers. It's the S17 Plus servers that were
22 purchased with Bank of Montana loan proceeds that we're
23 concerned about. Well, we argue and believe we have
24 established a first position security interest in those
25 servers based on the facts.

10:10:52

1 Alternatively, we believe, in equity, Project Spokane
2 and Sean Walsh, inseparable, are estopped from claiming a
3 first position--lien position. UCC filings aside, equitable
4 principles are specifically incorporated into the UCC for
10:11:09 5 precisely these circumstances.

6 In terms of an irreparable injury, the defendants don't
7 actually really argue that there is not an irreparable
8 injury. We would be losing a valuable lien right, a
9 property right. Everybody agreed that these servers, as it
10:11:25 10 turned out, would be collateral that Bonner Property
11 Development could use if everything went south to satisfy
12 the Bank of Montana loan. Well, everything went south and
13 now they have nothing if this sale with respect to the
14 servers is allowed to go forward. That's an irreparable
10:11:42 15 injury. A lien in property as collateral is irreparable.
16 Monetary damages can't satisfy that.

17 And they haven't really argued against that, but what
18 they have said is if the Court does grant injunctive relief
19 as they have requested, that there should be a bond imposed.

10:11:57 20 Well, number one, there should be no bond with respect
21 to the fixtures or the fixture-like property. It's our
22 property, not theirs. It shouldn't be sold, period. There
23 is no chance that the defendants would have damages with
24 respect to that. There should be no bond.

10:12:10 25 So let's talk about a bond with respect to the servers.

1 The Court is correct. Those servers have a diminishing life
2 capacity. We don't deny that. But we do dispute how much
3 of a diminished life capacity that they have. We have
4 submitted with our materials expert testimony about that
10:12:31 5 issue.

6 Number one--well, I should step back. One, Mr. Walsh
7 argues that he could put these servers to work and they
8 would generate gross revenue. He puts that in his
9 Declaration. Well, gross revenue they might generate,
10:12:48 10 Judge, but not net revenue. That is highly doubtful and
11 indeed quite speculative, because you have to keep in mind
12 that that's exactly what they were doing out in Bonner three
13 months ago. HyperBlock was operating. It wasn't making a
14 profit. Couldn't pay its energy bills. Ceased operations.
10:13:05 15 Its parent went bankrupt, and now everybody agrees that
16 HyperBlock has no assets to pay any of its bills. Well, to
17 say that Mr. Walsh could go and re-create that situation is
18 speculative at best. It also ignores that there would be no
19 place for those servers. The lease is terminated. It's
10:13:23 20 over. HyperBlock hasn't paid its rent. The incredible
21 energy cost, his argument in that regard doesn't account for
22 that either.

23 So we encourage the Court to disregard that part of
24 their argument altogether. It's too speculative to base an
10:13:37 25 adequate ruling on.

1 THE COURT: Okay, now--

2 MR. ERICKSON: Now, Judge, there is the issue--

3 THE COURT: You are getting close to running out of
4 time. So tell me, can the cases be consolidated for trial?

10:13:52 5 MR. ERICKSON: Yes, Judge.

6 THE COURT: And how quickly would you be prepared to
7 try the case?

8 MR. ERICKSON: I'm familiar with the Court's desire
9 for expediency and I think six months is adequate. I'm not
10:14:08 10 going to say it wouldn't be a struggle, but we're up to the
11 task.

12 THE COURT: Okay. Anything else you want to argue?

13 MR. ERICKSON: No, Judge, thank you.

14 THE COURT: All right. Mr. Patten.

10:14:25 15 MR. PATTEN: The fundamental purpose of what
16 Mr. Nelson and the other plaintiffs are trying to do is to
17 change the terms of a contract and make parties to a
18 contract who weren't made parties before. There is only one
19 document that provides that Mr. Nelson is to have a first
10:15:04 20 lien and that is the Credit Enhancement Agreement. And
21 while there were multiple iterations of the parties'
22 agreements, they were done in the form--and these would be
23 from Mr. Nelson's exhibits. They were done in the form of
24 periodic amendments to agreements. So they take an original
10:15:35 25 set of a lease and other agreements and then they start

1 modifying them through a single document.

2 The Credit Enhancement Agreement is dated sometime in
3 December of 2018. It was modified again a year later in
4 2019--at the end of the year 2019.

10:16:01

5 But what I want to do is talk about what the agreements
6 require and what the crux is.

10:16:42

7 Article--or Paragraph 1.2 of the Credit Enhancement
8 Agreement requires that HyperBlock, LLC is to grant a first
9 position lien to Mr. Nelson or Bonner Property Development.

10 The Credit Enhancement Agreement does not require Mr. Walsh
11 or Project Spokane to do anything. They are not parties to
12 that agreement. And fundamentally what the plaintiffs are
13 presenting to this court is that they want to change the
14 agreement and make Mr. Walsh and Project Spokane explicit
15 parties to the agreement, and they do that only after the
16 business fails and they want to change the agreement.

10:17:09

17 Effectively what they are asking the Court to do is to
18 reform the Credit Enhancement Agreement to include Mr. Walsh
19 and Project Spokane as parties to it. If you look at the
20 various agreements, Your Honor, and the modifications, there
21 were sophisticated parties that were preparing that. Bonner
22 Property Development had a sophisticated attorney.
23 HyperBlock, LLC had a sophisticated attorney, and the
24 documents reflect that.

10:17:33

10:17:58

25 Mr. Walsh and Project Spokane were not parties to the

1 contract. They did not have attorneys because they didn't
2 need one because they weren't parties to the contract.

3 All of the transaction documents that were signed by
4 Mr. Walsh were signed in his capacity as the CEO of
10:18:22 5 HyperBlock, Inc. They were not signed individually but only
6 in a representative capacity. Neither Walsh nor Project
7 Spokane were requested to execute any documents in
8 connection with the Credit Enhancement Agreement or anything
9 else at the time these transactions and various documents
10:18:51 10 were signed.

11 THE COURT: What about HyperBlock, LLC? You are
12 talking about HyperBlock, Inc., but they are in bankruptcy
13 in Canada.

14 MR. PATTEN: Correct. And if I said Inc., I
10:19:01 15 misspoke.

16 THE COURT: Okay.

17 MR. PATTEN: HyperBlock, LLC. You asked
18 Mr. Erickson a question about why didn't they get a
19 guarantee from Mr. Walsh. Well, they could have. They
10:19:15 20 didn't ask him. If they would have asked him, I don't know
21 what he would have said but the question never came up. The
22 issue never came up. Similarly, they never asked or
23 required Mr. Walsh or Project Spokane to take the steps
24 necessary in order for Bonner Property Development to have a
10:19:39 25 first lien on the servers. That would require a

1 subordination agreement, would require that Walsh and
2 Project Spokane affirmatively subordinate their liens that
3 are otherwise going to be senior liens to the lien of
4 Bonneville--I keep saying Bonneville--Bonner Property
10:20:05 5 Development. They didn't do that. They had sophisticated
6 attorneys. Nobody said anything about it. Nobody asked him
7 to do it.

8 It's undisputed that the Project Spokane and the Walsh
9 liens are senior by reason of the filing financing
10:20:22 10 statements with the Delaware Secretary of State. It's
11 undisputed that prior to the--at least the assignment--or,
12 excuse me, the Credit Enhancement Agreement Project
13 Spokane's lien was of record through its financing
14 statement. And in 2000--in December of 2019 when the
10:20:56 15 agreements were all modified to provide for the purchase of
16 servers rather than the purchase of transformers and such
17 on-site improvements, at that point in time Mr. Walsh's lien
18 was of record. Nobody--nobody said anything about it.
19 Nobody asked him to do anything about it. And it's
10:21:21 20 undisputed that Bonner Property Development didn't even file
21 a financing statement until about a month ago.

22 So what's happened is, Bonner Property Development has a
23 contract that it didn't think all the way through and didn't
24 include all of the necessary steps in order to provide that
10:21:53 25 it would, in fact, have a first lien on these 1,493 servers

1 purchased with the Bank of Montana loan. And they are now
2 trying to fix that mistake by saying, oh, now, Mr. Walsh and
3 Project Spokane have to do something that they didn't agree
4 to do and that nobody asked them to do and effectively make
10:22:18 5 them a party to this contract when they are not parties to
6 the contract.

7 Getting to the likelihood of success on the merits, Your
8 Honor--

9 THE COURT: Before you go there, do you agree with
10:22:40 10 Mr. Erickson that the Uniform Commercial Code does have and
11 incorporate some equity principles?

12 MR. PATTEN: It allows--it has language that it
13 doesn't affect equitable principles unless it's contrary to
14 the terms of the Uniform Commercial Code.

10:23:07 15 THE COURT: Is that a yes or a no?

16 MR. PATTEN: Well, it's both, Your Honor; because I
17 think the question is, do equity principles override the
18 lien priorities of the code, and I don't think they do. The
19 lien priorities are the lien priorities. Article 9 is a
10:23:32 20 race. It's a race to the Secretary of State's office and
21 whoever gets there first wins. And in this case Project
22 Spokane won and Mr. Walsh came in second and now Bonner
23 Property Development comes in third. And I don't think that
24 they can use equitable concepts to upset the lien priority
10:23:58 25 that is specifically laid out in Article 9.

1 The problematic issue I think here for--for the
2 defendants is while Mr. Walsh's signature appears on the
3 various documents, it's his testimony that he didn't read
4 them. He just had his assistant use his electronic digital
10:24:35 5 signature to sign them. Mr. Erickson says that's not
6 credible. But as CEO, Mr. Walsh has a lot of ground that he
7 has to cover, and he assigned the project, the transaction,
8 to a management team and they did it, and so he didn't have
9 knowledge of the provision in the Credit Enhancement
10:25:12 10 Agreement, which is the only place in all of the documents
11 that talks about a first lien position. He was unaware that
12 that Credit Enhancement Agreement would require him to
13 subordinate and Project Spokane to subordinate their senior
14 liens.

10:25:33 15 THE COURT: So what difference does it make if
16 that's what the agreement says? That's sort of flipping
17 your argument about the plaintiffs on its head, isn't it?
18 You are arguing the same thing. Well, that may be what the
19 contract says but that isn't really--we want to have some
10:25:51 20 other modification of that agreement.

21 MR. PATTEN: Not at all, Your Honor, because it's
22 Mr. Walsh who--if HyperBlock, LLC wants to grant a senior
23 lien to Bonner Property Development and Bonner Property
24 Development wants to have a senior lien, then there's a way
10:26:17 25 to do that and it's not--and nobody did it.

1 And so while--while HyperBlock, LLC can say, yeah, you
2 can have a senior lien, Walsh didn't know that and he wasn't
3 a party individually to the contract. And so the lack of
4 knowledge means he didn't agree to it as an individual. And
10:26:53 5 while knowledge of what's in the contract may be imputed to
6 him as the signator of the Credit Enhancement Agreement,
7 that was imputed to him as HyperBlock, LLC and doesn't
8 change the fact that he wasn't aware of that language in the
9 Credit Enhancement Agreement.

10:27:18 10 And so if he was not aware of that language in the
11 Credit Enhancement Agreement, then he can't have--he wasn't
12 the promissor. The promissor was HyperBlock, LLC. So there
13 is no promissory estoppel. He didn't have actual knowledge
14 of it and so there can't be equitable estoppel. There can't
10:27:54 15 be fraud because he didn't make the promise. He didn't make
16 the representation.

17 And in terms of the unjust enrichment and I think the
18 notion--I sense the notion bothers the Court, but there are
19 times when people don't get paid and there's not an
10:28:22 20 equitable remedy for every time somebody doesn't get paid.
21 There are times when the law requires a certain result that
22 perhaps is unfair, but it's still the law. And here the law
23 is that the first guy to the Secretary of State's office
24 wins. And we ask the Court to impose that law on the
10:28:58 25 arguments of Bonner Property Development. And I think that

1 all shows that they don't have a likelihood of success on
2 the merits.

3 In terms of the irreparable injury, and maybe this is
4 confusing and perhaps I'm confused, but it seems to me that
10:29:23 5 if they are trying to enjoin Mr. Walsh and Project Spokane
6 from realizing on their collateral through a disposition
7 sale, then the question is not whether it's going to leave
8 HyperBlock insolvent but whether somehow Mr. Walsh and
9 Project Spokane are going to be insolvent. Because if they
10:29:49 10 use their debt to them to credit bid as Mr. Erickson
11 described, they will own the assets and they would have
12 acquired the assets in accordance with the terms of the
13 Uniform Commercial Code. And so then the question is, are
14 they going to be insolvent so that if they convince this
10:30:12 15 court that, in fact, Mr. Walsh and Project Spokane should be
16 liable for the claim of a first lien through these equitable
17 arguments that they raise, then will they have an inadequate
18 remedy by having a money judgment against Mr. Walsh and
19 Project Spokane. And, again, there is no evidence that
10:30:43 20 Mr. Walsh or Project Spokane won't be in a position to stand
21 behind and make up on a monetary judgment.

22 THE COURT: So I'm not entirely clear on the
23 argument about credit. They can sell it for some sort of
24 credit. So you could get a straw person to issue a credit,
10:31:06 25 say we'll give you \$10 million for those computers and give

1 a note. And then the note liberates the physical property
2 so that Mr. Walsh and Spokane--Project Spokane then have the
3 physical asset they could turn around and sell. In the
4 meantime the credit note can be worthless.

10:31:36

5 MR. PATTEN: I don't think that's correct, Your
6 Honor. So the notion is a credit bid. So if--if a secured
7 creditor is owed \$2 million and there's a disposition sale
8 of the collateral, then that secured creditor who's owed
9 \$2 million can say I will bid up to \$2 million for the--to
10 acquire the collateral at a disposition sale and the amount
11 of the credit bid just reduces what is owed to me.

10:32:02

12 So if--

10:32:22

13 THE COURT: Give it to me here in terms of Mr. Walsh
14 and the security interest that he claims and has perfected
15 in Delaware. What happens?

10:32:46

16 MR. PATTEN: So--so, Your Honor, if Project Spokane
17 credit bids its \$5 million, Canadian dollar, whatever that
18 converts to in U.S. dollars, and says I'll bid \$5 million
19 for all of these assets and nobody outbids him, then Project
20 Spokane can--will own the assets for five million bucks.
21 And at that point HyperBlock's debt to--HyperBlock, LLC's
22 debt to Project Spokane would be satisfied.

10:33:05

23 THE COURT: But is there money that's exchanged?

24 MR. PATTEN: No, because--

25 THE COURT: I'm just going to cut--you owe me five

1 million and I'll cut it back to 500,000 and I take the
2 secured property.

3 MR. PATTEN: Yes.

4 THE COURT: So it could be a situation there is
10:33:22 5 never any money exchanged, but the asset could end up in
6 Mr. Walsh and Project Spokane's control and then they could
7 turn around and either use those assets someplace else or
8 sell them on the open market or whatever the Bitcoin market
9 might support. Am I right?

10:33:44 10 MR. PATTEN: I think you are right, Your Honor.
11 That's explicitly allowed in the Uniform Commercial Code.

12 THE COURT: I'm not arguing the law. I'm trying to
13 understand the law.

14 MR. PATTEN: Okay, sorry. But it's not an
10:34:01 15 infrequent result in a disposition sale.

16 THE COURT: Well, you are the one who deals with
17 that all the time.

18 So I don't know if you have anything else you want to
19 argue. You are about out of time.

10:34:13 20 But what about consolidating the cases for trial? Any
21 problem with that? It seems like it's all the same thing,
22 just different claims.

23 MR. PATTEN: Well, the concern I would have about
24 that, Your Honor, is if it remains as a jury trial, it may
10:34:32 25 be unduly confusing to the jury as to who's who and which

1 claim is which.

2 THE COURT: I don't think so.

3 MR. PATTEN: You would know better than I, Your
4 Honor.

10:34:44

5 THE COURT: Well, I mean, we have had a lot of
6 complicated cases and I, believe it or not, have a lot of
7 faith in juries. I think if you guys do your jobs in terms
8 of preparing clear proposed instructions and I do my job by
9 making sure they understand what's going on, I think they
10 can keep these claims separate. It may be a different
11 question about if there ever was a judgment, then what. But
12 that's something we would have to deal with.

10:35:03

13 How much time would it take? I mean, I've heard six
14 months. I've suggested four months. And I think you said
15 that would be a little tight. Six months?

10:35:21

16 MR. PATTEN: Well, Your Honor, we've got a small
17 shop.

18 THE COURT: When I worked for Judge Battin, one of
19 the lawyers at Crowley was in the Montana Legislature. This
20 is years ago. And every other year when the Legislature
21 met, that lawyer would come over and say he needed to
22 continue all of his cases. I think Crowley was 11 lawyers
23 at the time. And Judge Battin finally had it up to here and
24 called Cale over and said, Cale, you've got to do one of two
25 things: Either hire more lawyers or stop taking the work.

10:36:09

1 And they hired more lawyers, as you know.

2 MR. PATTEN: I appreciate that, Your Honor. I think
3 six months is the earliest that we could do it.

10:36:35

4 THE COURT: Okay. So--and you already argued about
5 a bond. You haven't suggested any--

10:36:54

6 MR. PATTEN: Well, I think if--and the other point
7 that I want to bring up is I think the plaintiffs misread
8 Mr. Alters' affidavit that they filed as an attachment to
9 the reply brief. Because as I read Mr. Alter's affidavit,
10 it says what the current value of the computers are. Not
11 what the diminution amount would be but what the current
12 value is.

10:37:16

13 And I think if the--and he has a six-month amount of
14 what they will be worth--what they are worth today and what
15 they will be worth in six months, and it's 3 or \$400,000,
16 I'm saying off the top of my head but it's calculable from
17 his declaration. I think the bond ought to be at least that
18 amount. And, frankly, the bond ought to be what the servers
19 could earn in addition to that over that particular time
20 period.

10:37:43

21 THE COURT: So I think I'm hearing, but I might be
22 inferring something that you are not comfortable with. What
23 property is it Mr. Walsh and --

24 MR. PATTEN: Project Spokane?

10:38:07

25 THE COURT: -- Project Spokane want to sell?

1 MR. PATTEN: They want to sell everything.

2 THE COURT: Well, the real property?

3 MR. PATTEN: No, no. But they want to sell all of
4 the servers.

10:38:17 5 THE COURT: Yeah.

6 MR. PATTEN: They want to sell all of the things
7 that are not fixtures, which brings up another little
8 complication where people I don't think were paying
9 attention to what the law is. But there is an agreement
10:38:28 10 where certain items will be deemed fixtures. Certain items
11 that are personal property and subject to the Article 9 will
12 be deemed fixtures and--

13 THE COURT: Is that the fans?

14 MR. PATTEN: Well, I think the fans probably are
10:38:42 15 fixtures because you remove the fans, you've got big holes
16 in the ceiling. But there are some electrical components
17 that are just sitting on or bolted to a concrete pad that
18 can be unbolted and removed without causing any damage to
19 the property itself.

10:38:55 20 THE COURT: How about the 150 feet--or 150,000 feet
21 of wire that I saw? It's 150,000 feet of 10-gauge wire.

22 MR. PATTEN: I would say this, Your Honor; that if
23 it requires making a hole in the building to remove the
24 wires, then it's a fixture. If it's sitting on a
10:39:22 25 conduit--in a conduit that is screwed to the floor and can

1 be unscrewed, then it's not a fixture.

2 THE COURT: How about the 5,000-kilovolt substations
3 and their switching gear?

10:39:40

4 MR. PATTEN: I think those--those, I understand, are
5 just sitting on and may be bolted to a cement pad, so they
6 can be removed and they are not fixtures.

7 THE COURT: And the 500-kilovolt transformers?

8 MR. PATTEN: Same.

9 THE COURT: Okay. Anything else?

10:39:58

10 MR. PATTEN: No, Your Honor. Thank you.

11 THE COURT: All right. Well, thank you for the
12 argument and the relatively expeditious briefing. I'll get
13 something out either today or tomorrow.

10:40:21

14 Now, having said that, it seems to me like this is ripe
15 for early intervention to try and get the thing resolved. I
16 am going to refer the matter to Judge DeSoto to conduct a
17 settlement conference, because the value of those computers,
18 regardless of what I do, they are going to take a hit and if
19 they take a hit, whomever is correct is going to take a hit.
20 So I don't know about Mr. Walsh being in Puerto Rico. My
21 experience is that things work in person. I don't know what
22 the travel limits are and all that sort of stuff. So if you
23 have some issue with a settlement conference, tell me now so
24 we don't waste your time or everybody else's.

10:40:55

10:41:24

25 MR. PATTEN: I hate to make a commitment, Your

1 Honor, without talking to Mr. Walsh, but I'm a proponent of
2 some efforts.

3 THE COURT: What I would do is refer it to Judge
4 DeSoto. She would then contact you. You would have time to
10:41:40 5 talk to Mr. Walsh and they would have time to talk to their
6 clients, and then she would make the preliminary inquiry,
7 are we wasting our time if I have a settlement conference?
8 And if the answer is yes, then there won't be a settlement
9 conference, but there will be an early trial date. As I
10:42:03 10 indicated, I probably wouldn't be very amenable to a request
11 for continuances of anything. In the event that there ever
12 was a request for a continuance, I would have to require--I
13 would require that the client be here when we talk about a
14 continuance so that it's not, well, the Court's too busy and
10:42:28 15 the Court's continuing this. It will be somebody asking and
16 probably not getting a continuance. So I think it's
17 important. And the bond issue I'll have to consider.

18 MR. PATTEN: Your Honor, there is one little issue.
19 So we have six exhibits attached to our briefs--or our brief
10:42:56 20 on the Nelson case. I don't think there is any dispute with
21 Mr. Erickson or his clients about the admission of those
22 exhibits.

23 THE COURT: Mr. Erickson, is there?

24 MR. ERICKSON: That's correct, Judge, and we've
10:43:09 25 also--

1 THE COURT: Okay, that's what I understood earlier.

2 All right, thank you, counsel. And we will be in
3 recess. You will hear from me either this afternoon or
4 tomorrow.

10:43:21

5 (Whereupon, court was in recess at 10:43 a.m.)
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C E R T I F I C A T E

STATE OF MONTANA)
) ss.
COUNTY OF MISSOULA)

I, Julie M. Lake, RDR, CRR, CSR, Freelance Court Reporter for the State of Montana, residing in Missoula, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings in the above-entitled cause;

I further certify that the foregoing pages of this transcript represent a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on this the 6th day of July, 2020.

Julie M Lake
Julie M. Lake, RDR, CRR, CSR
Freelance Court Reporter
State of Montana, residing in
Missoula, Montana.